Date of Hearing: April 20, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 424 (Stone) – As Introduced February 4, 2021

As Proposed to be Amended

**SUBJECT**: PRIVATE STUDENT LOAN COLLECTIONS REFORM ACT: COLLECTION ACTIONS

**KEY ISSUE**: SHOULD ENTITIES THAT COLLECT PRIVATE STUDENT LOAN DEBT HAVE TO POSSESS RELIABLE EVIDENCE SHOWING THAT THEY OWN THE DEBT AND PERMITTING ACCURATE CALCULATION OF THE BALANCE OWED, REGARDLESS OF WHETHER OR NOT THE DEBTOR HAS LEGAL REPRESENTATION?

## SYNOPSIS

*This bill would ensure that private student loan creditors can only collect from California borrowers if they have evidence proving, first, that they own the debt, and second, the exact amount that the borrower owes. These protections would be available whether or not the borrower is represented by an attorney. This bill is modeled on California's Fair Debt Buying Practices Act, a 2013 law that has reduced collection lawsuits for unpaid credit card debt by nearly 60 percent by requiring competent evidence in such cases.*

*This analysis addresses the following issues:*

1) *How does a private student loan collection action typically proceed?*
2) *Don't judges have to review the evidence before issuing judgments?*
3) *How are case outcomes different if a borrower is represented by an attorney?*
4) *How will this bill help ensure that creditors properly demonstrate ownership of debts?*
5) *How will this bill help ensure that creditors can prove how much borrowers actually owe?*
6) *How will this bill help ensure that creditors do not manufacture evidence for purposes of suit?*
7) *How will this bill facilitate settlements?*
8) *How will this bill protect against improper service?*
9) *Why do banks and credit unions oppose this bill?*

*This bill is co-sponsored by Consumer Reports, NextGen California, Student Borrower Protection Center, Student Debt Crisis, and Young Invincibles, and supported by 23 other organizations, including the California Dental Association, California Association of Realtors, California Federation of Teachers, and SEIU California. It is opposed by the California Bankers Association and the California Credit Union League. The bill passed out of the Assembly Banking and Finance Committee earlier this month on a 9-3 vote. This analysis incorporates and discusses amendments to the bill that are proposed to be taken in this Committee.*

**SUMMARY**: Applies protections adapted from the Fair Debt Buying Practices Act to the collection of private student loans. Specifically, **this bill**:

1) Establishes the Private Student Loan Collections Reform Act.

2) Defines "private education loan" as an express extension of credit to a consumer, in whole or in part, for postsecondary educational expenses, regardless of whether the student's educational institution provided the loan. Excludes from this definition the following:

   a) Loans made, insured, or guaranteed by the federal government.

   b) Open-end credit or any loans secured by real property or a dwelling.

   c) Short-term extensions of credit by an educational institution to cover gap periods between financial aid installments.

3) Defines "private education lender" as either:

   a) A person or entity that engages in the business of securing, making, or extending private education loans.

   b) A holder of a private education loan.

4) Defines "private education loan collector" as a person, other than a private education lender, that is collecting or attempting to collect a defaulted private education loan.

5) Defines "private education loan collection action" as a judicial action in which a claim to collect a private education loan is asserted.

6) Defines "original creditor" as the private education lender identified in a promissory note, loan agreement, or loan contract entered into with a student loan borrower or cosigner.

7) Defines "creditor" as any of the following:

   a) The original creditor, so long as ownership of the private education loan has not been sold, assigned, or transferred.

   b) The person or entity that owned the private education loan when it defaulted, so long as the loan was not subsequently sold, transferred, or assigned.

   c) A person or entity that purchased a defaulted private education loan, whether it collects the private education loan itself, hires a third party for collection, or hires an attorney for collection litigation.

8) Defines "borrower" and "student loan borrower" as a person who has received or agreed to pay a private education loan.

9) Defines "cosigner" as an individual who is liable for the obligation of another without compensation, regardless of how that individual is designated in the applicable contract or instrument. Includes (i) individuals who are liable under a private education loan extended to consolidate a borrower's preexisting private education loans, and (ii) individuals whose signature is a condition to grant credit or forbear from collection. Excludes spouses whose signatures are required to perfect the security interest in a loan.

10) Defines "debtor" as a borrower, cosigner, or other person that owes or is alleged to owe an unpaid amount on a private education loan.

11) Defines "consumer report" and "consumer reporting agency" as having the same definitions as these terms do under the federal Fair Credit Reporting Act.

12) Prohibits a private education lender or a private education loan collector from making any written statement to a debtor in an attempt to collect a private education loan unless the private education lender or private education loan collector possesses the following information:

    a) The name of the owner of the private education loan.

    b) The creditor's name at the time of default, if applicable.

    c) The creditor's account number, if any, used to identify the private education loan at the time of default.

    d) The amount due at default.

    e) An itemization of interest and fees, if any, claimed to be owed, and whether those were imposed by the original creditor or any subsequent owners of the private education loan.

    f) The date that the private education loan was incurred.

    g) The date of the first partial payment or the first day that a payment was missed, whichever is earlier.

    h) The date and amount of the last payment, if applicable.

    i) Any payments, settlement, or final remuneration of any kind paid to the creditor by a guarantor, cosigner, or surety, and the amount of payment received.

    j) The names of all persons or entities that owned the private education loan after the time of default, if applicable, and the date of each sale or transfer.

    k) A copy of the self-certification form and any other "needs analysis" conducted by the original creditor prior to origination of the loan.

    l) Documentation establishing that the creditor is the owner of the specific individual private education loan at issue, subject to the following requirements:

        i) If the loan was assigned more than once, each assignment or other writing evidencing the transfer of ownership of the specific loan, so as to establish an unbroken chain of ownership from the original creditor.

        ii) Each assignment or other writing evidencing transfer of ownership must contain the original creditor's account number, the date of purchase and assignment, and the borrower's correct name associated with the original account number.

        iii) Each assignment or other writing evidencing transfer of ownership may not be a document prepared for litigation, but must be the actual document by which the assignee acquired the loan.

m) A copy of all pages of the contract, application, or other documents evidencing the debtor's liability for the private education loan, stating all terms and conditions applicable to the private education loan.

n) A log of all collection attempts made in the last 12 months, including the date and time of all calls and letters.

o) A statement as to whether the creditor is willing to renegotiate the terms of the private student loan.

p) Copies of all settlement letters made in the last 12 months, or in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit.

q) A statement as to whether the private education loan is eligible for an income-based repayment plan.

r) A statement as to whether the debt arising from the private education loan is dischargeable in bankruptcy.

13) Requires a private education lender or a private education loan collector to include in its first written collection communication with the debtor, and any time the debtor requests thereafter, the information set forth in 12).

14) Requires that all settlement agreements between a debtor and either a private education lender or private education loan collector be documented in open court or otherwise reduced to writing. Further requires that the debtor be provided a copy of the written agreement.

15) Mandates that if a private education lender or private education loan collector accepts a payment as a complete settlement of an outstanding private education loan, that it has to provide the payor with a final statement with specified information, including that a zero balance is owing. This statement may be provided electronically if the parties agree.

16) Forbids a private education lender or private education loan collection from bringing suit or initiating an arbitration or other legal proceeding to collect a private education loan if the applicable statute of limitations has expired.

17) Requires, in a collection action brought by a private education lender or private education loan collector to collect a private education loan, that the complaint allege all of the following:

a) The information set forth in 12) a) – j).

b) That collection of the debt is not time barred under applicable law.

c) That the plaintiff has complied with 12) and 13).

18) Requires that the complaint have attached to it the documents set forth in 12) k) – m).

19) Clarifies that this bill shall not be deemed to require the disclosure in public records of personal, financial, or medical information if its confidentiality is protected by state or federal law.

20) Prohibits a default or other judgment from being entered against a defendant in an action initiated by a private education lender or private loan collector unless the plaintiff submits documents to the court establishing the facts required to be alleged by 17) a) and b). These documents must be properly authenticated and in a form admissible as a business record under the Evidence Code.

21) Prohibits a court from entering a default judgment in an action on a private education loan unless the plaintiff has complied with the requirements of this bill, and grants the court discretion to dismiss the action if the plaintiff has failed to do so.

22) Permits a person to set aside a default or default judgment in an action brought by a private education lender or private education loan collector using the procedures established by the Fair Debt Buying Practices Act if service of the summons resulted in the person not receiving actual notice of the action.

23) Provides a cause of action against a creditor, private education lender, or private education loan collector that violates any provision of this bill. Available remedies include:

    a) Actual damages sustained as a result of the violation.

    b) Statutory damages of not less than $500 per violation.

    c) Exemplary damages under an existing Civil Code provision.

    d) An order vacating any default judgment taken against the plaintiff.

    e) Restitution of all moneys taken from or paid by the plaintiff after its default judgment was taken.

    f) An order directing the private education lender or private education loan collector to either furnish correct information to a credit reporting agency or request that the credit reporting agency correct its report.

    g) Costs and reasonable attorney's fees, unless the defendant can show that the plaintiff's suit was not brought in good faith.

24) Provides that, in a class action, defendants shall be liable for statutory damages under 23) b) to each named plaintiff. Additional damages of up to the lesser of $500,000 or one percent of the net worth of the defendant are available if the court finds that the defendant engaged in a pattern and practice of violating a provision of this bill.

25) Exempts private education lenders and private education loan collectors from liability for damages if they show by a preponderance of the evidence that a violation was not intentional and resulted from a bona fide error, and occurred notwithstanding the maintenance of procedures reasonably adopted to avoid error.

26) Declares any waiver of the provisions of this bill to be contrary to public policy, void, and unenforceable.

27) Declares the provisions of this bill to be severable, so that if any provision is held invalid, that this invalidity shall not affect other provisions that can be given effect without the invalid provision.

28) Makes other technical and conforming changes.

**EXISTING LAW**:

1) Provides the Student Borrower Bill of Rights, which imposes requirements and prohibitions on student loan servicers intended to promote meaningful access to affordable repayment and loan forgiveness benefits and to ensure that California borrowers are protected from predatory student loan industry practices. (Civil Code Sections 1788.100 – 1788.101.)

2) Requires, under the Student Loan Servicing Act, student loan servicers to obtain a license from the Department of Financial Protection and Innovation unless they meet specified exemptions. (Financial Code Section 28100 - 28182.)

3) Regulates the practice of buying charged-off consumer debt and the conduct of debt buyers under the Fair Debt Buying Practices Act (FDBPA). (Civil Code Sections 1788.50 – 1788.66.)

**FISCAL EFFECT**: As currently in print this bill is keyed fiscal.

**COMMENTS**: This bill would ensure that private student loan creditors can only collect from a borrower if they have evidence proving, first, that they own the debt, and second, the exact amount that the borrower owes. It is modeled on California's Fair Debt Buying Practices Act, a 2013 law that has reduced collection lawsuits for unpaid credit card debt by nearly 60 percent through requiring competent evidence in such cases. According to the author:

> As of June 2020, more than 650,000 Californians owed $10.3 billion in private student loan debt. Private student loans often have higher interest rates and offer fewer consumer protections than federally-backed student loans. […]
>
> When borrowers fall behind on loan payments, lenders and collectors pursue aggressive litigation, characterized as an "assembly line of lawsuits" against borrowers. Yet, trusts, servicers, and collectors routinely fail to prove that they own the loan, file lawsuits within the statute of limitations, and comply with court requests for additional information. Nevertheless, lenders and collectors automatically win many of these lawsuits because borrowers are unfamiliar with the judicial system, or are unable to afford legal representation. Court rulings in favor of debt collectors result in garnished wages or seizure of federal benefits deposited in bank accounts.
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> AB 424 will protect private student loan borrowers from unsubstantiated lawsuits and collection on illegitimate debts. The bill requires private student loan lenders and debt collectors to comply with common sense evidentiary standards when bringing debt collection lawsuits against borrowers.

The themes outlined in the author's statement are echoed by the bill's supporters.

***Private student creditors rely on shoddy evidence.*** A research paper, published by Student Borrower Protection Center and Young Invincibles (co-sponsors of this bill) and several other organizations, demonstrates how shoddy the evidence in private student loan lawsuits is:

> [P]rivate student loan creditors have sued more than 100,000 student loan borrowers in courtrooms across the country over allegedly unpaid student loan debts. However, these lawsuits often lack evidence or documentation proving that the creditors have a legal right to collect on these debts. Instead, creditors rely on mass-produced documents, deceptive court claims, and intimidation tactics to scare borrowers into paying or simply not showing up to court. Hundreds of thousands of student loan borrowers who have defaulted on these loans, including those who have been the target of lawsuits, are being forced to hand over money they may not owe. These borrowers may be unaware that debt collectors do not have proper documentation and overwhelmed at the prospect of being dragged into court. (Student Borrower Protection Center, et al., *Dubious Debts* (Mar. 2021) at 4, *available at* https://protectborrowers.org/wp-content/uploads/2021/03/Dubious-Debts_2021.pdf.)

***Consequences of judgments for borrowers.*** Legal Aid Foundation of Los Angeles, a nonprofit legal services provider, has seen firsthand the hardships engendered by private student loan collections:

> Most of our clients and their families suffer debilitating, long-term consequences from student loan defaults. For private student loans, they suffer from negative credit histories, which impact their ability to find housing and employment. In the event a judgment is entered against them, they also face long-term financial distress caused by wage garnishment and bank account levies because many of these lawsuits result in extremely large default judgments.
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> Private student loans create unique difficulties for borrowers. Unlike federal student loans, they often have extremely high interest rates and lack affordable repayment options. Unlike other unsecured debt, student loans are not eligible for bankruptcy discharge except in very limited circumstances. Therefore, when borrowers cannot make their monthly payments—because they are low-income, lack employment, or due to other difficult circumstances—they have few options to prevent aggressive debt collection tactics and lawsuits.

***The racial dimensions of student loan lending and collections***. Student Borrower Protection Center writes in support of this bill that "[l]ow-income and students of color are more likely to take out these private loans and are often subjected to predatory practices that increase their debt burden and decrease their likelihood of payoff." The Center adds that student loan collection lawsuits "disproportionately target borrowers of color, and may contribute to a widening racial wealth gap driven, in part, by student debt."

Academic research also finds disproportionate harms to black student loan borrowers:

> In 2010, almost 375,000 borrowers had entered default within two years of repayment, with black borrowers approximately 1.4 times more likely to default than white borrowers. In addition, higher levels of borrowing among first year students are associated with lower graduation rates for low income and black students." (Fletcher & Fuller, *Does the House Always Win? An Analysis of Barriers to Wealth Building and College Borrowing*, Journal of Student Financial Aid 50(1) (Feb. 11, 2021) at 5, *available at* https://ir.library.louisville.edu/jsfa/vol50/iss1/3.)

***Issue #1: How does a private student loan collection action typically proceed?*** If a borrower fails to make timely payments on a private student loan, the loan will go into default. Borrowers then face collections activity and additional negative credit reporting. Creditors typically begin trying to collect debts through informal methods such as writing to borrowers and contacting them by phone. If these methods are unsuccessful, creditors can sue borrowers for unpaid debts and any accrued interest on the debt. Collection actions are generally a one-sided affair. As discussed below, as many as 90 percent of borrowers may be unrepresented in private student loan collection actions. Consequently, nearly all of these lawsuits result in a judgment entered in favor of the creditor, in the amount sought by the creditor. Given that private student loans are commonly taken out for amounts in the tens of thousands of dollars, judgments on these loans are often similarly large. Interest accrues at the statutory rate of 10 percent simple interest per year from the date the judgment is entered. Typical collection methods include garnishing the debtor's wages, seizing and selling the debtor's personal property, placing a lien on any real property that the debtor owns, and seizing funds from the debtor's bank account.

***Issue #2: Don't judges have to review the evidence before issuing judgments?*** The evidence in private student loan collection cases is rarely reviewed by a judge. This is because most borrowers are unrepresented in these cases. An unrepresented defendant generally does not contest the case, or proves unable to navigate the complexities of civil litigation in order to defend themselves. As a result, the defendant loses by default. A default judgment is one in which a court clerk enters a judgment for the creditor, and awards the creditor whatever damages it is seeking. A judge never reviews the evidence, and the debtor never gets a chance to contest the debt.

***Issue #3: How are case outcomes different if a borrower is represented by an attorney?*** The University of California, Irvine School of Law Consumer Law Clinic (UCI) analyzed California Superior Court records of case filings by the six largest private student loan debt collectors, which each engage exclusively in collection of private student loan debt. In conducting this analysis, UCI examined cases filed between 2018 and 2020 in 17 California counties. Urban (Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, and Santa Clara), suburban/exurban (Contra Costa, San Mateo, Riverside, San Bernardino, and Ventura) and rural (Butte, Fresno, Kern, Merced, and San Joaquin) counties were all represented in the study. The results show that:

- 90 percent of defendants were unrepresented in cases filed in 2018, 94 percent in 2019, and 89 percent in 2020.

- During this period, a judgment was entered against only one debtor who was represented by an attorney. Meanwhile, judgments were entered against 113 unrepresented defendants.

- The majority of remaining cases are either still pending or were resolved in ways indicating that they were likely the subject of settlement agreements.

These numbers are a damning indictment of how our legal system functions in these cases. Private student loan creditors are essentially guaranteed a favorable outcome around 90 percent of the time if they sue borrowers. The predictable consequence of a legal system in which a plaintiff's evidence is not reviewed by a judge or by opposing counsel is that the plaintiff will not bother to go to the trouble to compile competent evidence. Yet if an attorney does represent

the borrower, the borrower is virtually certain to win, because the evidence may often be so shoddy in these cases.

***Background re: the Fair Debt Buying Practices Act.*** This situation is quite similar to the situation that used to be presented in thousands of lawsuits for charged-off consumer debt. In the small percentage of such cases in which defendants found attorneys to represent them (typically, nonprofit legal services attorneys), debt buyers almost never prevailed, largely because they were unable to introduce competent evidence of their ownership of the debt, of the defendant's contractual obligation to pay it, or the actual balance alleged to be owed. In the vast majority of cases, however, debt buyers would win by default, so that a judgment was entered in their favor, in the amount that they sought, because the alleged debtor did not appear in court to contest the case. Debtors would have their wages garnished, bank accounts levied, and liens placed upon their houses, all because they couldn't find an attorney to represent them.

In 2013, the Legislature enacted the Fair Debt Buying Practices Act (FDBPA) in response to these cases. The FDBPA put in place basic requirements for (1) the documentation that a debt buyer must possess to begin debt collection communication with an alleged debtor, (2) pleading standards in debt collection lawsuits, and (3) evidentiary standards to obtain a default judgment. It also created a private right of action for violations. The principle that underlay the FDBPA is that one's debt should not depend on whether one is fortunate enough to find an attorney.

A recent study found that between 2012 and 2017, collection case filings by the largest debt buyers in the most populous counties in California fell by 57 percent, attributed in substantial, though not exclusive, part to enactment of the FDBPA. (Center for Responsible Lending, *Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act* (sic.) (Oct. 2020) at 2, *available at* https://www.responsiblelending.org/research-publication/court-system-overload-state-debt-collection-california-after-fair-debt-buyer.)

The FDBPA has not eliminated debt buyer lawsuits, but rather, helped ensure that those which are filed meet basic evidentiary standards. Similarly, this bill will permit private student loan lawsuits to be filed and judgments to be entered, so long as creditors have the same basic evidence that borrowers' attorneys would require them to present in a contested lawsuit.

Interestingly, fewer than two percent of the defendants in the cases studied had attorney representation, meaning that the FDBPA was quite successful in curbing lawsuits based on deficient evidence—even without attorney involvement.

***This bill is being amended to more closely resemble the FDBPA.*** In recognition of the FDBPA's success in curbing lawsuits based on junk evidence, amendments proposed to be taken in this Committee will make this bill more closely resemble the FDBPA. Changes include:

- More clearly delineating which documents private student loan creditors must provide borrowers when they commence collection activity, which documents they must attach to the complaints in any collection action they file, and which they have to introduce into evidence in order to obtain a default (or other) judgment.

- Eliminating the cause of action under the Cartwright Act (Business and Professions Code Section 17000 *et seq.*) and replacing it with a class action provision, identical to the one in the FDBPA, that includes a damages cap.

- Ensuring that the private right of action in the bill allows defendant creditors to recover their attorney's fees if a court finds that the action was not brought in good faith, and providing a "bona fide error" defense for creditors in case they are sued for inadvertent errors.

Other relevant aspects of the bill, as it is proposed to be amended, are discussed below.

***Issue #4: How will this bill help ensure that creditors properly demonstrate ownership of debts?*** Plaintiffs who seek to collect unpaid private student loans often lack evidence that they have the legal right to collect on the loan. Standing to sue is a basic element that any plaintiff must prove in order to bring a lawsuit, but the defense must be able to raise the issue—which typically requires attorney representation. Legal Aid Foundation of Los Angeles writes:

> In our experience, the lender who originated the loans, who is the only creditor named in the written loan agreement, is rarely the plaintiff in these lawsuits. Instead, the plaintiff is a securitized trust or debt buyer who acquired the loan after one or more transfers. When a plaintiff is not named in a written loan agreement, under California law it is not entitled to a judgment unless it can show it is the real party in interest[, i.e.,] the person who owns or holds title to the claim or property involved. (Code of Civil Procedure Section 367; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal. App. 4th 995, 1004; *Gantman v. United Pac. Ins. Co.* (1991) 232 Cal. App. 3d 1560, 1566.) Thus, a plaintiff should not be able to obtain a judgment for breach of written contract to which it is not a named party, unless it provides admissible documentary evidence showing the complete chain of transfers of the individual contract from the original lender to the plaintiff. Otherwise, any person who has a copy of a written contract can file a lawsuit and obtain a judgment, based simply on a claim that the contract was transferred to it at some prior time.

Inability to prove ownership was also one of the reasons that the federal Consumer Financial Protection Bureau (CFPB) took action against the National Collegiate Student Loan Trusts (NCSLT) in 2017. The CFPB's complaint against NCSLT and its debt collection arm alleged that these entities filed over 2,000 collection lawsuits for private student loan debts, "but do not have or cannot find the documentation necessary to prove either that they own the loans or that the consumer owed the debt." (*CFPB Takes Action against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan Debt Collection Lawsuits* (Sep. 17, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/.)

In response, this bill, as amended, would require creditors to possess the information outlined in Items 12) a), b), c), j), and l) of the **SUMMARY** of the bill, above. This information would have to be provided to debtors on request, pled in the complaint, and proven when seeking a default or other form of judgment. Taken together, this information ought to establish that the private education loan creditor has the legal right to collect the debt in question.

***Issue #5: How will this bill help ensure that creditors can prove how much borrowers actually owe?*** Plaintiffs who seek to collect private student loans often lack accurate evidence of the amount that borrowers actually owe on these loans, taking into account any payments that borrowers have made and properly calculating any interest and fees accrued. The amount of damages must be properly proven in any action on a contract, but, again, the defendant must be

able to raise the issue, which typically requires attorney representation. Legal Aid Foundation of Los Angeles writes:

> Important information for assessing a borrower's legal obligation to repay a loan holder for the amount demanded includes (but is not limited to) the following:
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> (1) The complete terms of the loan agreement, which are necessary to fully assess … the interest rate, allowable fees, how the agreement defines default, … and other information. Often, the loan agreement incorporates other documents, such as the Truth-in-Lending-Act (TILA) disclosure, which is often the only document that specifies the original lender and the interest rate.
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> (2) A complete payment history to determine whether it was correctly calculated, whether any illegal fees were charged, and the date of default for purposes of assessing a statute of limitations defense.

In order to ensure that private student loan creditors are able to prove the amount they are seeking to collect, this bill, as amended, would require creditors to possess the information outlined in Items 12) d), e), f), g), h), i), and m) of the **SUMMARY** of the bill, above. It is simply unacceptable that defendants could have judgments entered against them for arbitrary or incorrect amounts, and then face wage garnishments, bank levies, and other collection activities for money that they do not owe.

***Issue #6: How will this bill help ensure that creditors do not manufacture evidence for purposes of suit?*** Private student loan collectors sometimes seek to evade their lack of evidence regarding ownership and the amount owed by relying on manufactured evidence and documents that have not been properly reviewed for their evidentiary correctness. Legal Aid Foundation of Los Angeles writes:

> Despite…basic legal requirements, private student loan holders often seek default judgments based on conclusory affidavits in which they falsely claim that attached documents show a complete chain of transfer of an individual loan agreement from an original creditor to a loan holder. In the cases we have seen, these documents only show transfers of large pools of loans that do not reference or identify the individual loan at issue in the case or refer to a document that identifies the individual loan but was prepared for litigation long after the loan transfers. Courts are routinely entering default judgments based on these "robo-signed" affidavits.

These abuses are described in much greater detail in a white paper issued by the National Consumer Law Center. (Smith & Kaplan, *Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases*, National Consumer Law Center (Apr. 2014), *available at* https://www.nclc.org/issues/student-loans-issues/private-student-loans.html.) Such abuses were also alleged by the CFPB in its action against NCSLT:

> In many of the collection lawsuits, false and misleading affidavits were filed. To be valid, these affidavits must be signed by a witness with personal knowledge of the consumers' account records and the debt. In numerous instances, affiants claimed personal knowledge of the student loan debt they did not have. (*CFPB Takes Action…*, *supra.*)

To safeguard against the use of manufactured evidence to obtain judgments against unrepresented borrowers, this bill, as amended, would:

- Prohibit creditors from establishing chain of title using a document prepared for litigation, rather than the actual document by which an assignee acquired the loan.

- Requires that documents submitted to the court to establish the facts necessary to obtain a default judgment be properly authenticated and in a form admissible as business records under Section 1271 of the Evidence Code.

Again, these are basic evidentiary issues that an attorney representing a defendant would raise. These requirements are intended to protect unrepresented borrowers, while simultaneously placing no obstacle to legitimate collection by private student loan creditors who possess competent evidence. These requirements are also a direct response to the CFPB's allegations, discussed above, that some private student loan creditors used false affidavits to secure default judgments. Specifically, the requirement that original documentation be attached to the filed complaint eliminates the opportunity for creditors to engage in similar practices. And the requirement that documents submitted to the court be properly authenticated provides student loan borrowers with an evidentiary standard that, if breached, can provide a basis for litigation against the creditor.

***Issue #7: How will this bill facilitate settlements?*** Legal Aid Foundation of Los Angeles emphasizes the importance of obtaining accurate information regarding debts so that borrowers can decide whether or not to settle cases:

> Borrowers lack the information they need to decide whether they should negotiate a repayment plan to avoid litigation, if they can afford to. […]
>
> We routinely request documentation from loan holders on behalf of our clients. […] [W]e have no assurance that those documents [that are provided in response to the request] are complete, because the loan holders are not legally obligated to provide any of these documents prior to litigation. As a result, borrowers and their attorneys cannot fully determine their legal obligation with respect to private student loans until a lawsuit is served.
>
> [As a result,] borrowers are left in a distressing limbo. They have no idea whether they have any legal obligation to make payments to the loan holder or debt collector, and have to wait for a lawsuit to find out. While they wait, their credit is ruined. Only after they have been sued do they have a right to obtain this information through discovery.

It should not take litigation to obtain accurate information about these debts, particularly when so many borrowers are unrepresented and will lose by default. Borrowers should also not have to rely on a creditor's (obviously self-interested) representations to decide whether or not to settle a case. Accordingly, this bill would require private student loan creditors to provide debtors with all of the information outlined in Item 12) of the **SUMMARY** of the bill, above. While this requirement may seem burdensome, it may actually facilitate settlement of debts (and avoid costly litigation for all parties) if it is evident to borrowers that the creditor can prove that they owe the debt. An analogous requirement in the FDBPA has not proven unduly burdensome for the debt buying industry. (*See* Civil Code Section 1788.52 (c)-(e).)

***Issue #8: How will this bill protect against improper service?*** A repeated issue in debt collection litigation is plaintiffs' failure to properly serve defendants, e.g., due to inaccurate information about defendants' addresses. Community Legal Aid SoCal, a nonprofit legal services provider that serves clients in Los Angeles and Orange Counties, writes:

> [I]n the case of improper service of the original Summons and Complaint[,] we may easily see an unintentional failure to defend. Imagine being twenty-one, finishing college, transitioning into full time work, [and] possibly relocating to establish a new home base. Unknown to you, you are served with a Summons and Complaint at an address wherein you previously resided while at college. You have no ties to the former address. You are not notified of the private student debt. Several years later you learn that there is a wage garnishment placed on your wages as a result of a Default Judgment only because your employer alerts you [that you are] "receiving paperwork." You look into things and learn that a Default was taken against you by a plaintiff whom you do not recognize and never did business with. You learn that the Judgment can be collected on for ten years and then easily can be extended for another ten years. You could possibly be forty-one years old and still be subject to garnishment and/or levy. […] [T]he time periods for setting aside the Judgements must be considered. Current law essentially prohibits effective Motions to Vacate Judgments except for in the first six months following a Default Judgment.

In other cases, creditors may deliberately fail to serve defendants and falsify process filed with the courts. (*See, e.g., Freeman v. ABC Legal Servs.* (N.D. Cal. 2012) 827 F. Supp 2d 919, 927 ["Plaintiff pointed out that Defendants' record showed Defendant Smith simultaneously completed two different serves, in two different locations."])

It is important that individuals have an adequate opportunity to set aside default judgments if they are able to secure attorney representation. The same issue arose with the FDBPA, which was amended in 2014 to provide defendants additional time to set aside default judgments than is ordinarily available under the Code of Civil Procedure. (*See* Civil Code Section 1788.61.) Accordingly, this bill will be amended to include the following provision:

> ***Notwithstanding Section 473.5 of the Code of Civil Procedure, if service of a summons has not resulted in actual notice to a person in time to defend an action brought by a private education lender or a private education loan collector and a default or default judgment has been entered against the person in the action, the person may serve and file a notice of motion and motion to set aside the default or default judgment and for leave to defend the action utilizing the procedures set forth in Section 1788.61.***

***Issue #9: Why do banks and credit unions oppose this bill?*** The only groups to oppose this bill are California Bankers Association and California Credit Union League, who contend that the bill would invalidate debts, and preclude collections, in the event of a minor deficiency in loan documentation. This position is stated in these groups' joint opposition letter, and was reiterated in their testimony at the Assembly Banking & Finance Committee.

The first response to this criticism is that bill does not call upon private student loan creditors to possess, or produce, a single document or piece of information that an attorney defending a collection action would not ask them to produce in the course of litigation. As discussed above, collection actions should not function as some sort of lottery, in which creditors gamble that they can get away with shoddy evidence because nine out of ten debtors are unrepresented. Further, this bill will be amended in Committee to make clear that creditors need not submit documents,

such as a collection log, that are not relevant to proving up a default judgment. This distinction is outlined in Item 20) of the **SUMMARY** of the bill, above.

The second response is that it is unclear that either banks or credit unions are actively originating or collecting private student loan debts in significant quantities. Late last year, Wells Fargo sold its $10 billion private student loan portfolio to a group of investment firms, thereby "making good on its notice to customers that it was exiting the private student loan space." (Truong, *Wells Fargo sells off private student loan business*, San Francisco Business Times (Dec. 21. 2020), *available at* https://www.bizjournals.com/sanfrancisco/news/2020/12/21/wells-fargo-cost-cutting-student-loan-portfolio.html.) The UCI study described above studied the six entities that most frequently file private student loan collection actions in California. These are:

- *Educap*, a lender and owner/creditor.
- *National Collegiate Student Loan Trusts***,** a series of trusts created by national banks and Wall Street firms to house $2 billion in largely subprime private student loans made between 2001-2007. While not the original lender, NCSLT is an owner/creditor, meaning that the banks no longer hold title to these loans.
- *Navient*, an owner/creditor, but generally not a lender, of private student loans.
- *SLM Student Loan Trust*, a trust that holds loans made by Sallie Mae Bank before 2014, but now owned by Navient. Navient is the owner/creditor for these loans.
- *Student Loan Solutions, LLC***,** a debt buyer which buys distressed private student loan debt from lenders and educational institutions. Student Loan Solutions is the owner/creditor for the loans.
- *US Asset Management*, a debt buyer which buys distressed private student loan debt from banks. US Asset Management is the owner/creditor for these loans.

These are all non-bank entities. Committee staff reached out to legal aid attorneys who assist student loan borrowers to ask whether, in their experience, any banks or credit unions regularly sue to collect unpaid private student loans. These attorneys responded that, in their experience, it had been years since banks or credit unions frequently brought cases to collect these loans.

In short, based on the information in the Committee's possession, this bill would not appear to affect the lending or collection activities of banks and credit unions in any significant way.

***ARGUMENTS IN SUPPORT:*** According to Community Legal Aid SoCal, the current power imbalance between collectors and debtors impedes settlements:

> Consumers tell us they want to settle consumer defense matters but they relate that they are met with resistance, lack of cooperation (unreasonable terms) and lack of civility. The odds are stacked in favor of the plaintiff loan servicers leaving the debt lenders and collectors with a lack of motivation to attempt [to] reach a fair, good faith settlement.

Consumer Federation of California emphasizes that COVID-related student loan relief measures only encompassed federally-funded loans, compounding the suffering that too many borrowers have experienced over the past year:

> Private student loans represent about 8% of total education debt, according to MeasureOne, which tracks data on private student lending. Not only were these borrowers left out of the pandemic related "payment pause" granted to federal borrowers, they are also rarely included in the ongoing legal and policy conversations about loan forgiveness.

California Association of Nonprofits, a statewide alliance of more than 10,000 nonprofit organizations, emphasizes the career-limiting impact of significant student loan debt:

> [A] 2016 survey of nearly 1,000 nonprofits…found that 23 percent of nonprofit employees have student loan debt of $90,000 or more. Student loan debt hampers the ability of the nonprofit sector to recruit and retain a workforce, which accounts for 1 in 14 jobs statewide.

***ARGUMENTS IN OPPOSITION:*** California Bankers Association and California Credit Union League jointly criticize this bill's evidentiary requirements:

> While we appreciate the intent of the bill to protect student loan borrowers, the required documentation that a private education lender or private education loan collector would have to provide appears to be an attempt to invalidate legitimate debts in the event of minor or inadvertent omissions in a log or document.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Consumer Reports (co-sponsor)
NextGen California (co-sponsor)
Student Borrower Protection Center (co-sponsor)
Student Debt Crisis (co-sponsor)
Young Invincibles (co-sponsor)
California Association for Micro Enterprise Opportunity (CAMEO)
California Association of Nonprofits (CalNonprofits)
California Association of Realtors
California Dental Association
California Federation of Teachers
California Low-Income Consumer Coalition
California Optometric Association
The Century Foundation
Community Legal Aid SoCal
Consumer Federation of California
Friends Committee on Legislation of California
Housing and Economic Rights Advocates (HERA)
Legal Aid Association of California
Legal Aid Foundation of Los Angeles (LAFLA)
Neighborhood Legal Services of Los Angeles
Public Counsel
Public Law Center
SEIU California
The Institute for College Access & Success (TICAS)
University of California, Irvine School of Law Consumer Clinic
University of California Student Association

University of San Diego School of Law Center for Public Interest Law
Western Center on Law and Poverty

**Opposition**

California Bankers Association
California Credit Union League

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